FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

76-180 J. HENRY SMITH, *etc. et al.*,
Appellants-Defendants,

against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *etc. et al.*,
Appellees.

76-183 BERNARD SHAPIRO, *etc. et al.*,
Appellants-Defendants,

against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *etc. et al.*,
Appellees.

76-5193 NAOMI RODRIGUEZ, *etc. et al.*,
Appellants-Intervenors,

against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *etc. et al.*,
Appellees.

76-5200 DANIELLE and ERIC GANDY, *etc. et al.*,
Appellants-Plaintiffs,

against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *etc. et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR STATE APPELLANTS

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellants
Shapiro and Lavine
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3385

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARIA L. MARCUS
MARK C. RUTZICK
Assistant Attorneys General
of Counsel

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A. The individual foster parents and foster children

The appellee foster parents have staked their entire factual claim in this case upon their description of the relationships between the three individual sets of foster parents and children, although this action purports to in-

volve classes of foster parents and foster children. Appellees have asserted throughout their brief that these three stories are typical of the New York foster care system (see e.g. pp. 3, 15). It is therefore necessary that the present status of these cases be presented to this Court. While no valid conclusion about foster care in New York can be drawn from three instances, it is ironic that these cases highlighted by appellees support appellants.

In recent weeks, the Wallace family has finally completed the long process of reunion which began three years ago. On January 7, 1977 the last of the four Wallace children—fourteen-year-old Cheryl—voluntarily returned to live with her mother and the three sisters with whom she had previously lived in foster care. See Affidavit of Eileen Stone, sworn to January 18, 1977 at 3, submitted in *State ex rel. Wallace* v. *Lhotan* (Sup. Ct., Nassau County), annexed to reply brief of appellants Gandy, et al. (hereafter "Stone Affidavit"). Cheryl now displays a great deal of affection to her mother. *Ibid.* The result of Cheryl's reunion is that she "now seems far happier, content and sociable than through the entire periods of her placements." *Ibid.*

Cheryl's return to the Wallace family makes it whole for the first time since 1970. Cynthia and Cathleen Wallace had returned to their mother on April 9, 1976, are now finally integrated into the home, and demonstrate their affectionate feelings for their mother. Affidavit of Diana Clingan, sworn to October 21, 1976 at 1, submitted in *State ex rel. Wallace* v. *Lhotan* (Sup. Ct., Nassau County), annexed to reply brief of appellants Gandy, et al. (hereafter "Clingan Affidavit"). Patricia Wallace, thirteen years old, returned to her mother's home "on her own volition", Clingan Affidavit at 1, on June 24, 1976, after an interim period with other foster parents subsequent to leaving the Lhotans. She is happy at home and performing well academically. *Ibid.* It was Patricia's return home, and subsequent happy adjustment, which sparked the change in

Cheryl's attitude that ultimately led to her final happy reunion with her family. Stone Affidavit at 2.

This conclusion to a tragic odyssey yields several lessons: 1) the combination of administrative and judicial proceedings authorized by New York law succeeded in this case in achieving the basic goal of the foster care system: reunion of a family split by forces beyond its control; 2) the removal of the Wallace children from the Lhotan home was not a grievous loss, but a necessary prerequisite to a happier future for each of them; 3) their expressed desire in 1974 and 1975 to remain with the Lhotans was not a true expression of their reasoned preference, but was influenced by forces they could not understand, including Mrs. Lhotan's "controlling influence", *State ex rel. Wallace* v. *Lhotan,* 51 A D 2d 252, 257 (Second Dept.) *motion for lv. to app. den.,* 39 N Y 2d 705 (1976), and 4) the familial bonds between Mrs. Wallace and her four children survived the children's four to six year foster care placements, and were quickly renewed and strengthened after the final reunion of the family.

If, as appellee foster parents have claimed, the Wallace story is typical of foster care in New York, the "liberty interest" appellees urge upon this Court has no constitutional dimension.

The recent changes in the life of appellant Rafael Serrano are, unfortunately, not so happy. Rafael is now living at the St. Peter's School in Peekskill, New York, rather than with the appellee foster parents, the Goldbergs, with whom he lived at the time this action commenced and was tried. The reason for this change is that in June of 1976 the Goldbergs separated and Mrs. Goldberg moved out of the Goldberg home, taking her own child and leaving Rafael behind.* Rafael's removal from the home to the resi-

* See petition filed in the Family Court of the State of New York, Bronx County, Case No. 2487, verified by Sidney Bruskin, Esq. and attached as an Appendix to the reply brief of appellant Smith.

dential treatment center was with the concurrence of Mr. Goldberg, who continues to see him.*

Mrs. Goldberg's expressed "commitment" to Rafael as stated in her testimony at trial was as follows:

> "Q. Do you plan to adopt Rafael?
>
> A. We have a commitment to him and to the agency that we want to keep him and raise him. We made that very clear to each one of the workers. We had to make that clear to Rafael from the beginning because it was a crying need of Rafael. He was constantly asking, are you going to throw me out, are you going to call the worker, and we had to reassure him constantly that no, we were not going to take him out, throw him out, that we were going to keep him."**

The lessons of this painful sequence of events are clear: 1) the responsibilities of foster parents toward foster children in their care are at all times terminable at the will of the foster parent without any due process whatever, no matter how the foster child may feel or what the foster child's "rights" may be; 2) the foster parent's attachment to the foster child did not match her feeling for her own child.***

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* *Ibid.*

** Appendix in this Court (hereafter "A") at 298a.

*** There has been no change in the status of the Gandy children; who continue to reside with appellee Mrs. Smith. See Appendix to Brief of Appellants Rodriguez, et al., at 116a-118a. As noted in State appellants' reply brief dated Sept. 16, 1976, Mrs. Smith is disabled physically by arthritis. She altered a doctor's report dated February 13, 1974 to the Catholic Guardian Society about her condition, obliterating the last sentence which read, "The patient in my opinion is totally disabled." She is unable to accompany the children to school and six-year-old Danielle must walk five blocks, crossing main thoroughfares not attended by school crossing guards to reach the school building. Because of

(*footnote continued on following page*)

B. The evidentiary limitations of appellees' case in the District Court

The significance to this Court of the recent developments in the Wallace and Serrano cases is greater than it might ordinarily be because of the appellees' exclusive reliance on the three individual sets of foster parents and children to establish the constitutional deficiencies in the New York foster care system. These were the *only* specific cases as to which appellees presented proof in the District Court.* There was in addition one empirical study of children in foster care in New York—that of Dr. David Fanshel. It supported the efficacy of the current system and the District Court never acknowledged its weight or import.

The evidentiary deficiencies of appellee foster parents' case in the District Court must be stressed here, because both the foster parents and several of the *amici curiae* have sought to buttress that case in this Court through the citation of various articles and purported studies of foster care. Studies or opinions of persons who were not subject to cross-examination and rebuttal by appellants in the District Court are not evidence.

Indeed, the danger of relying on citations to academic studies is illustrated by the references in the Legal Aid Society's *amicus* brief to a study by the New York State Board of Social Welfare, "Foster Care Needs and Alternatives" (1974) (known as the "Bernstein Report"). The brief (p. 32) cites that report for the proposition that "the majority of children now in foster care are inappropriately placed." Examination of the report itself shows

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(*footnote continued from preceding page*)

Mrs. Smith's physical condition, Eric who is nine years old must go several blocks to the store alone and pick up the family's shopping. Affidavit of Bracha Graber dated May 28, 1974 and filed in the District Court.

* It should be noted that the District Court refused to permit the appellant natural parents to present actual case histories to the court. See Brief of Appellants Rodriguez, et al. at 92-94, A. at 309a.

that the document actually states just the opposite. At page 20 it explicitly notes that 55.7%—a majority—of all current placements were appropriate. Further, in calculating the number of placements thought to be "inappropriate", the report finds all 3,951 long-term placements in general institutions, all 214 temporary placements in general institutions, and all 190 placements in secure detention facilities "inappropriate" simply as a matter of policy, and not because the institutions were individually deficient (p. 20). These policy judgments would thus account for 15.1%—more than one-third—of the 42.8% so-called "inappropriate" placements. Thus, aside from policy disputes the Bernstein report finds two-thirds of all placements appropriate. Moreover it must be stressed that the report did not evaluate individual foster family homes or institutions to discern "bad" ones from "good" ones—it was only concerned with *types* of placements without regard to their availability in the present system.*

The brief also cites (p. 32) the report to show that the annual cost per child in a general institution is $34,000. Again, this is a misreading of the report, which actually shows (at p. 44) that the annual cost of long-term care at a general institution is $16,900, less than one-half the $34,000 rate claimed in the brief. The higher rate applies only (as footnote 2 to the table explicitly notes) to temporary general institutions, such as public shelters used to provide emergency care until an initial long-term placement can be found. The difference in annual cost is substantial.

These examples are not exhaustive. They merely show the great risk in forming judgments on the basis of hearsay such as published reports.

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* The report also shows that even under the authors' criteria, transfers within foster care *improved* the appropriateness of placements—raising the level of appropriate placements from an initial rate of 42.3% to the current rate of 55.7% (Bernstein report at 20).

C. The "liberty" interest alleged to inhere in the foster care relationship

The parties to this proceeding have disagreed at both stages of constitutional due process analysis: whether the foster parent-foster child relationship is a protected "liberty" interest, and if so whether New York procedures are adequate to protect it. However, some of the *amicus* groups—the Legal Aid Society (LAS), Community Service Society (CSS) and National Juvenile Law Center (NJLC) have suggested an intermediate position: that New York procedures are adequate in the event of a return to the natural parents but inadequate to protect the child in the event of a transfer from one foster home to another foster home.* See LAS at 23, 30; CSS at 7, 22; NJLC at 19, 22, 23. Another *amicus,* the *ad hoc* Group of Concerned Persons for Children (GCPC), adopted the appellee foster parents' view that a hearing is necessary in every case. GCPC at 13 et seq.

Each of the "intermediate" *amicus* groups offered a different rationale for the distinction it sought to draw. The National Juvenile Law Center saw the distinction as resulting from four countervailing administrative factors present in the return-home situation but absent in the foster home to foster home move. NJLC at 20-21, 23-25. The Community Service Society viewed the difference as stemming from the fact that in the absence of abuse or neglect, social services officials have no discretion to refuse to return a child to his natural parents. (CSS at 23). Legal Aid Society saw the distinction as mandated by a

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* These *amici* disagree among themselves as to the scope of any protected liberty interest of the child in the foster care relationship. The Puerto Rican Family Institute, Inc. and Puerto Rican Association for Community Affairs, by contrast, took no position on foster home to foster home transfers in their *amicus* brief, and opposed creation of a due process right to a hearing prior to return home.

balancing of competing liberty interests of the child. LAS at 25.

These arguments are not adequate to support a distinction of constitutional magnitude. For example, the National Juvenile Law Center presents (at 20-21) some apt reasons why the return-home decision is made with care, in addition to the basic fact that child care professionals do not act arbitrarily or without good cause as a matter of course. Yet of the four factors which they believe guarantee careful return-home decisions, three are also present in the transfer decision. First, if indeed social workers share middle class values with foster parents, a worker would not be inclined to transfer a disadvantaged child out of such a stable middle-class home for any reason.* Second, large caseloads and high turnover of agency staff would militate against any ill-considered movement whatever, both transfers and returns home. (In fact one would expect return-home cases to receive priority over transfers within foster care.) Finally, foster parents would use their influence to prevent what was in their opinion an unwise transfer as well as an unwise return home, and of course could obtain a pre-removal conference in both cases. See 18 N.Y.C.R.R. § 450.10. Of the National Juvenile Law Center's four factors, only the financial disincentive factor is lacking in the transfer case, and no one has seriously claimed that agency decisions are based in any substantial way on financial considerations.

While the "intermediate" *amici* all accord distinct priority to the natural family, some nonetheless argue for the existence of a constitutionally protected liberty interest in the foster parent-foster child relationship. The appellee foster parents (brief at 45-47), argue that such an interest flows automatically from citation of various prior decisions

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* That social workers do suffer from such class-colored judgments was neither alleged nor proved in this case.

by this Court concerning the family relationship in vastly different contexts.*

It is the *amicus* brief of Concerned Persons for Children, some of whom were appellees' leading witnesses, which fully delineates the implications of the "liberty" interest in the foster care relationship. The brief assumes that the foster parents are the only possible providers of "life-support systems" (GCPC at v, 26) for children once the children have been in their homes for one year. *Amicus* presents a narrow view restricted to the child's present environment, rejects psychiatric evidence of a tenacious attachment to natural parents, and assumes that these parents can offer no "life support" to their own children.

Their Orwellian argument, punctuated by a continuing cannibalistic metaphor in which the State is said to "dismember" the family and "wrench" nurturing bonds, carries an implication that no one except the child is equipped to make decisions for him while he is in foster care.** This contention would then bring due process into play in a wide range of situations. The child could arguably

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* The attempt to conjure sweeping new constitutional rights for children from universally accepted generalizations about the importance of the family has met with failure on at least two recent occasions. See *Black* v. *Beame*, —— F. 2d —— (2d Cir. February 24, 1977) (Slip Op. 1991); *Child* v. *Beame*, 412 F. Supp. 593 (S.D.N.Y. 1976).

Similarly, appellees' argument for the protection of the foster parent-foster child relationship as a "state-created benefit" (appellees' brief at 49-52) is erroneous under New York law, and is analogous to the arguments specifically rejected in *Black* v. *Beame*, *supra*, and *Child* v. *Beame*, *supra*. Separation from home—which is *substitute* parent care—cannot be called a benefit in comparison to available care by the real parent.

** The argument also suggests that the child should be entitled to a hearing *before* being voluntarily placed into foster care, since the State could there be said to be assisting in the "dismemberment" of the natural family. An analogous argument, raised by appellees' counsel here, was rejected in *Black* v. *Beame*, *supra*.

challenge school placements and medical treatment. He might also be able to challenge his foster parents' expenditure of their monthly stipend for him.*

Further, if the child does enjoy such a protected status, this status will inevitably come into conflict with his natural parent's protected interest in obtaining his return home (though it seems clear that the Group of Concerned Persons does not recognize such a protected interest, since it conflicts with their "psychological family" doctrine). The District Court's hearing requirement would be empty unless the court had intended the information presented at the hearing to be applied against a substantive standard which places a high value on the child's liberty interest in the foster care relationship. Judges would inevitably grant stays during the process of administrative and judicial review, and would ultimately give the natural parents' claim less weight than it presently has even where such parents are neither neglectful nor abusive.

Thus, both the intermediate position advocated by some of the *amicus* groups and the absolutist position urged by appellees and the Group of Concerned Persons for Children must fail because both are predicated on the existence of a liberty interest for the foster child in his relationship to a set of foster parents with whom he has resided for one year. No such liberty interest can co-exist with society's long held belief in the primacy of the natural family.

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* If these predictions seem unlikely in light of today's law, it is respectfully suggested, for instance, that this Court's decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) is today being applied in circumstances which would have seemed inconceivable when that case was decided seven years ago. See, e.g., *Schneider* v. *Whaley*, 417 F. Supp. 750 (S.D.N.Y.) *modified and remanded*, 541 F. 2d 916 (2d Cir.) *affd. on rehearing* —— F. 2d ——, (2d Circuit, December 22, 1976) (Slip Op. 6121), which held that there is a constitutional right to a hearing when children are moved from one day care center to another because of budgetary restrictions.

D. Existing State procedures

Both the District Court* and the appellee foster parents (appellees' brief at 70) contend that the Family Court in a § 392 proceeding lacks the power to order a foster child to remain in a particular foster home. They ignore several cases exercising that power, see *Matter of Cynthia, S.*, 74 Misc 2d 935 (Fam. Ct., N.Y. Co., 1973); *Guardianship of Denlow*, 87 Misc 2d 410, 384 N.Y.S. 2d 621 (Fam. Ct., Kings Co., 1976); *Matter of Mark H.*, 80 Misc 2d 593 (Fam. Ct., St. Lawrence Co., 1974) and rely exclusively on one 1974 Family Court case, *In re W.*, 77 Misc 2d 374 (Fam. Ct., N.Y. Co., 1974). But in that case, the court actually did direct the foster child to remain with the foster parents until after exhaustion of administrative remedies, including the § 400 fair hearing. *Id.* at 377. In so doing, the court in effect converted the § 400 hearing into exactly the kind of *pre-removal* hearing the appellees are seeking in this case.

What *In re W* actually shows is the flexibility of the § 392 procedure in protecting the rights of all the interested parties, and the rigidity of District Court's automatic hearing procedure. The ability of foster parents (and children through the Law Guardians which may be provided to them) to use the § 392 proceeding to obtain a § 400 hearing *prior* to removal eliminates the District Court's and appellees' fears of harm to a foster child through precipitous removal, and undermines the rationale for the District Court's decision.**

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* Joint Appendix to Appellants' Jurisdictional Statement (hereinafter A.J.S.) at 14a, Section 392, N.Y. Social Services Law.

** The appellee foster parents also expressed doubt that they could bring a habeas corpus petition to obtain return of a foster child removed from their home. They are wrong. That form of judicial review is available to them under New York law, along with the other procedures previously detailed. See *Mundie* v. *Nassau County Dept. of Social Services*, —— Misc. 2d ——, 387 N.Y.S. 2d 767, 770-71 (Sup. Ct., Nassau Co., 1976), involving an emergency removal from a foster home on the grounds of possible abuse by the foster parents.

CONCLUSION

The decision below should be reversed and the complaint dismissed.

Dated: New York, New York
March 14, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellants
Shapiro and Lavine

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARIA L. MARCUS
MARK C. RUTZICK
Assistant Attorneys General
of Counsel

Louis J Lefkowitz
Attorney General
by
Maria L Marcus
Assistant Attorney General